IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

ARGUS LEADER MEDIA, d/b/a Argus Leader, Plaintiff, v. UNITED STATES DEPARTMENT OF AGRICULTURE, Defendant.	File No. 4:11-cv-04121-KES **DEFENDANT FOOD MARKETING INSTITUTE'S RESPONSIVE BRIEF IN OPPOSITION TO ARGUS LEADER MEDIA'S MOTION FOR A NEW TRIAL AND MOTION TO DEFER ACTION ON AWARD OF ATTORNEY FEES AND COSTS**

Pursuant to Local Rule 7.1(B), Defendant Food Marketing Institute (FMI) responds to the motions of Plaintiff Argus Leader Media (Argus) for a new trial, Dkt. 215, and to defer action on award of attorney's fees and costs, Dkt. 213.

INTRODUCTION

This case should finally be over. The United States Supreme Court decided it on the merits: "[T]he store-level SNAP data at issue here *is confidential*" under Exemption 4. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (emphasis added). Argus's obvious distaste for the outcome does not entitle it to a new trial. The newspaper has not cited a single precedent supporting its astonishing request to restart from scratch a case that the highest court in the land has already conclusively decided. Instead, Argus angrily denounces its loss (a "legal travesty"); derides the U.S. Solicitor General's Office (which "blantant[ly] misrepresent[ed] the record" in the Supreme Court); attacks Justice Neil Gorsuch (guilty of

"serious misfire[s]" in his opinion that five other Justices joined in its entirety); and lectures the Supreme Court itself (which "overstepped its bounds as an appellate court").

This Court should not condone much less reward such inappropriate commentary. All that remains is for this Court to perform the ministerial duties necessary to implement the Supreme Court's decision and bring this case to a full and complete conclusion. The Court should deny Argus's motion for new trial and deny as moot Argus's motion to defer action on the award of attorney's fees and costs.

ARGUMENT

I. The Supreme Court resolved the merits of this case by holding that the "SNAP data at issue here is confidential under [FOIA Exemption 4]."

The Supreme Court definitively held that the SNAP data at issue is "confidential" under FOIA Exemption 4. *Food Mktg. Inst.*, 139 S. Ct. at 2366. The Court viewed the term "confidential" as "suggest[ing] two conditions": (1) that the information is "customarily kept private, or at least closely held, by the person imparting it," and (2) that "the party receiving [the information] provides some assurance that it will remain secret." *Id.* at 2363. The Court then considered whether both conditions must be satisfied to render information "confidential" under Exemption 4, and it ultimately determined that while the first condition is required, there was no occasion to resolve whether the second condition is also required, because it too was satisfied here:

> Must both of these conditions be met for information to be considered confidential under Exemption 4? At least the first condition has to be; it is hard to see how information could be deemed confidential if its owner shares it freely. And *there's no question that the Institute's members satisfy this condition*; uncontested testimony established that the Institute's retailers customarily do not disclose store-level SNAP data or make it publicly available "in any way." Even within a company, witnesses testified, only small groups of employees usually have access to it. But what about the second condition: Can privately held information *lose* its confidential character for purposes of Exemption 4 if it's communicated to the government without assurances that the government will

> keep it private? As it turns out, there's no need to resolve that question in this case because *the retailers before us clearly satisfy this condition too*. Presumably to induce retailers to participate in SNAP and provide store-level information it finds useful to its administration of the program, the government has long promised them that it will keep their information private.

Id. (citation omitted, emphases added).

To be clear, unlike its practice in many cases, the Supreme Court did not announce an abstract interpretation of a statute and then leave the application of that interpretation to this Court. When the Court disclaims any resolution of the specific dispute, it provides express instructions for the lower courts to do so. *See, e.g.*, *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) ("We therefore remand the case to the District Court so that the plaintiffs may have an opportunity to prove concrete and particularized injuries using evidence—unlike the bulk of the evidence presented thus far—that would tend to demonstrate a burden on their individual votes."); *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 901 (2014) ("Expressing no opinion on the validity of the patent-in-suit, we remand, instructing the Federal Circuit to decide the case employing the standard we have prescribed."). Here, the Supreme Court instead explicitly held that "there's no question that the Institute's members satisfy th[e] [first] condition" and that "the retailers before us clearly satisfy th[e] [second] condition too." *Food Mktg. Inst.*, 139 S. Ct. at 2363. The Supreme Court then repeated that holding in its concluding paragraph: "[T]he store-level SNAP data at issue here is confidential under th[is] construction . . . ." *Id.* at 2366.

Because it applied its interpretation of Exemption 4 in favor of FMI, the Supreme Court's "reversal . . . ensure[ed] exactly the relief the Institute requests." *Id.* at 2362. As this Court implicitly recognized in its August 7 email to counsel, there are no substantive issues left for this Court to resolve on remand. Instead, the only tasks left for the Court are the important but ministerial duties of vacating the various orders inconsistent with the Supreme Court's ruling and

entering a judgment in favor of USDA. Because the case is over with respect to the only substantive matter at issue, there is no reason to delay resolving the attorney's fees and costs issue.

II. Argus's motion for new trial improperly asks this Court to reverse the Supreme Court's ruling.

Argus lost. The Supreme Court made that very clear. In seeking a new trial, Argus is asking this Court to reconsider the Supreme Court's decision, in part because Argus regards its loss as a "legal travesty" and believes that the Supreme Court "overstepped its bounds as an appellate court." Dkt. 216 at 7, 14.

Argus's attacks are open, not veiled. Instead of filing a motion for rehearing, it waited until the remand to *this* Court to criticize Justice Gorsuch, the opinion's author, pointing out supposedly key points that he (and apparently the other Justices who joined his majority opinion) "failed to notice," matters that he "seems to have completely overlooked," "serious misfire[s]" he made, and various other of his "misapprehen[ions]." *Id.* at 4-6. The U.S. Solicitor General's Office also draws fire. Argus levels serious yet unfounded accusations of professional misconduct, accusing the office of acting "disingenuously" and "blatant[ly] mispresent[ing] the record." *Id.* at 4-5. Because the Supreme Court and the Solicitor General's Office supposedly committed these purported misdeeds or simply did not understand Argus's arguments, Argus believes it should get a do-over and receive a new trial on the dispositive point that the Supreme Court already resolved—whether the SNAP data at issue in the case qualifies for Exemption 4. *Id.* at 14.

Argus is wrong on its attacks on the Supreme Court's role and its resolution of the merits; its attacks on the Solicitor General are unfounded. The Supreme Court's function is "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Zero Justices of the

Supreme Court voted to affirm the Eighth Circuit's judgment. But even assuming for argument's sake that Argus, and not all nine Justices, is correct on the merits, it still wouldn't matter. A remand from the Supreme Court is not an invitation to correct the Supreme Court; right or wrong, it sits atop the judicial hierarchy. "[W]hen a case has been decided by an appellate court and remanded for further proceedings, every question decided by the appellate court, whether expressly or by necessary implication, is finally settled and determined, and the court on remand is bound by the decree and must carry it into execution according to the mandate." *Thompson v. C.I.R.*, 821 F.3d 1008, 1011 (8th Cir. 2016). It is basic that "an inferior tribunal is bound to honor the mandate of a superior court" in our judicial system. 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4478.3, at 733 (2d ed. 2002). "Many cases illustrate the general rule that an appellate mandate binds a lower court on remand, whether remand be from the Supreme Court or from a court of appeals." *Id.* at 734 (2d ed. 2002 & Supp. 2019) (citations omitted). As the Fourth Circuit has noted:

> The mandate rule serves two key interests, those of hierarchy and of finality. . . . The principle of hierarchy is no empty shell. It protects the very value and essential nature of an appeal . . . . This is not to say that appellate courts are somehow superior or always correct, but only that our system has been served well by the availability of review and the need for appropriate review to be final.

Doe v. Chao, 511 F.3d 461, 465 (4th Cir. 2007). The Supreme Court's mandate is the highest mandate of all and cannot be transgressed on remand: "When the Supreme Court ha[s] executed [its] power in a case before [it], . . . [w]hatever was before the Court and is disposed of, is considered finally settled." *Sibbald v. United States*, 37 U.S. 488, 488 (1838); *see also, e.g.*, *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895) ("When a case has been once decided by this court on appeal, and remanded to the circuit court, whatever was before this court, and

disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case, and must carry it into execution according to the mandate.").

If Argus felt that the Supreme Court had gotten the decision so obviously wrong, it should have petitioned for rehearing in the Supreme Court, not in this Court. *See* Sup. Ct. R. 44. Argus chose not to do so, which means that the Supreme Court's decision is now final, even if all of Argus's baseless accusations were well-founded. This Court's duty is to implement the Supreme Court's ruling, which entails denying Argus's motion for new trial and its motion to defer action on the award of attorney's fees and costs.

III. In any event, the Supreme Court did nothing wrong by applying its interpretation of Exemption 4 to the well-developed record of this case.

Of course, Argus's substantive complaints about why it should get a do-over are meritless as well. Argus is correct the Court that the parties went to trial in 2016 under the then-applicable test from *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). But even if the Supreme Court had not authoritatively held that nothing relating to the merits remains open, Argus is wrong to claim that whether retailers kept the SNAP data private was not at issue at trial and that it thus did not have the opportunity to present evidence on this point. *See* Dkt. 216 at 2 ("[T]he SNAP retailers' concept of secrecy [was] a matter of no legal significance during the *Argus v. USDA* trial."); *id.* at 5 ("Whether SNAP retailers considered their government SNAP payments to be 'confidential' was not in issue and, quite obviously, was not part of the litigation.").

After all, the Supreme Court did not so much *change* the test as limit it by stripping away requirements that FOIA did not authorize. The *National Parks* "substantial competitive harm" test always incorporated an actual confidentiality requirement as the threshold step in assessing the applicability of Exemption 4. Indeed, the D.C. District Court in *National Parks* began its

analysis by determining that the information requested in that case qualified as "confidential" because it "was of the kind 'that would not generally be made available for public perusal.'" *National Parks*, 498 F.2d at 770. The D.C. Circuit reversed, but it did so by adding *additional* steps on top of that baseline confidentiality requirement:

> While we discern no error in this finding, we do not think that, *by itself*, it supports application of the financial information exemption. The district court *must also* inquire into the possibility that disclosure will harm legitimate private or governmental interests in secrecy.

Id. (emphases added). If actual confidentiality had not been present in either *National Parks* or in this case, there would be no point in proceeding to assess competitive harm.

Accordingly, Argus's claim that actual secrecy was "neither material nor relevant until the Supreme Court decided it should be *the* pivotal fact," Dkt. 216 at 14, is simply an error. The *National Parks* test made actual secrecy a necessary condition for deeming information "confidential." Courts applying *National Parks* confirm this basic point by consistently holding that information released to the public does not qualify as "confidential." *See, e.g.*, *Anderson v. HHS*, 907 F.2d 936, 952 (10th Cir. 1990) ("Because materials such as these appear to be in the public domain, no meritorious claim of confidentiality can be made."); *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987) ("To the extent that any data requested under FOIA are in the public domain, the submitter is unable to make any claim to confidentiality—a *sine qua non* of Exemption 4"). Argus itself cited one such case in its Eighth Circuit briefing. Argus Br. at 31 (Oct. 17, 2017), in *Food Mktg. Inst. v. Argus Leader Media*, 889 F.3d 914 (8th Cir. 2018) (citing *Madel v. United States*, CV 13-2832 (PAM/FLN), 2017 WL 111302, at *2 (D. Minn. Jan. 11, 2017) ("Because report 1 is now publicly available, the only information still at issue between the parties is oxycodone distribution information specific to the four companies

from 2006 to 2012.")). Argus is thus wrong when it suggests that Supreme Court changed the law to add a new secrecy requirement.

Moreover, Argus cannot complain that it did not have the opportunity to present evidence at trial regarding whether SNAP data was kept private. *See, e.g.*, Dkt. 216 at 2. USDA presented multiple witnesses who testified that grocery retailers zealously protect the secrecy of that data and never make it public. *See, e.g.*, Dkt. 185 at 205 (Andrew Johnstone testifying that K-Mart "do[es] not publish or make available in any way SNAP information as to Kmart."); *id.* at 251 (Peter Larkin testifying that grocery retailers never publicly release financial information). Argus had the chance to cross-examine these witnesses on this point. It chose not to. Instead, Argus did the opposite, eliciting testimony from its own expert, Dr. Richard Volpe, *confirming that the SNAP data was not public*. Dkt. 186 at 350:20-23 ("Q: To your knowledge, the SNAP data that's being requested in this case is not public at this point. Is that correct? A: To my knowledge, that's correct.").

Argus had a full and fair opportunity to make a record on the secrecy of the SNAP data. The Supreme Court correctly recognized the uniformity of the testimony on that point and properly applied its Exemption 4 interpretation to the existing record. Its resulting conclusion that "the store-level SNAP data at issue here is confidential under th[is] construction," *Food Mktg. Inst.*, 139 S. Ct. at 2366, was correct and is binding on this Court.

IV. There is no compelling reason to delay any action on the award of attorney's fees and costs.

Argus asks the Court to postpone consideration of its motion for attorney's fees from USDA until the Court decides the motion for new trial. Dkt. 213. For all the reasons above, Argus is not entitled to a new trial. The Court should therefore deny Argus's motion for new trial and then deny the requested postponement related to its attorney's fees request as moot.

CONCLUSION

In light of the Supreme Court's decision and for all the reasons above, FMI respectfully requests that the Court do the following:

- deny Argus's motion for new trial, Dkt. 215;
- deny Argus's motion to defer action on award of attorney fees and costs, Dkt. 213;
- vacate the Court's memorandum opinion, order, and judgment dated November 30, 2016, Dkts. 127 & 128;
- vacate the order awarding costs, Dkt. 192;
- vacate the order granting Argus's motion for attorney's fees from USDA, Dkt. 193;
- vacate the order to amend, Dkt. 196;
- deny Argus's motion for attorney's fees from FMI, Dkt. 199;[1] and
- enter judgment in favor of USDA.

[1] On May 15, 2018, Argus sought recovery of attorney's fees from FMI under 5 U.S.C. § 552 in the Eighth Circuit and asked the Eighth Circuit for a limited remand to this Court of its fees motion. Motion for Attorney Fees (May 15, 2018), in *Food Mktg. Inst. v. Argus Leader Media*, 889 F.3d 914 (8th Cir. 2018). The Eighth Circuit did not decide the fees motion but remanded it to this Court for determination. *See* Dkt. 199. Argus is not entitled to such fees from FMI. First, Argus is not a "prevailing party" entitled to such fees under FOIA because it has not received relief whatsoever, neither through "a judicial order, or an enforceable written agreement or consent decree," nor through "a voluntary or unilateral change in position" by the government. 5 U.S.C. § 552(a)(4)(E); *see also Zarcon, Inc. v. N.L.R.B.*, 578 F.3d 892, 893 (8th Cir. 2009). Second, FOIA's fee-shifting provision allows a court to assess fees only "against the United States," 5 U.S.C. § 552(a)(4)(E)(i), not a private entity like FMI. *See Texas v. Interstate Commerce Comm'n*, 935 F.2d 728, 734 (5th Cir. 1991) (holding that FOIA does not permit recovery of attorney's fees from a corporation because "[t]he statute by its terms allows courts to assess fees *only against the United States*, and [appellant] offers no plausible reason for interpreting Congress's intent to be otherwise") (emphasis added).

Respectfully submitted,

LYNN, JACKSON, SCHULTZ & LEBRUN, PC

By: */s/ R. Alan Peterson*

R. Alan Peterson
110 N. Minnesota Ave., Suite 400
Sioux Falls, SD 57104
Tel.: (605) 332-5999
Fax: (605) 332-4249

BAKER BOTTS L.L.P.

Gavin R. Villareal
(admitted *pro hac vice* [Dkt. 144])
Thomas R. Phillips
(admitted *pro hac vice* [Dkt. 145])
98 San Jacinto Blvd., Suite 1500
Austin, TX 78701
Tel.: (512) 322-2500
Fax: (512) 322-2501

COUNSEL FOR DEFENDANT
FOOD MARKETING INSTITUTE

CERTIFICATE OF SERVICE

R. Alan Peterson, attorney for Defendant Food Marketing Institute, hereby certifies that he served by electronic mail, a true and correct copy of the foregoing document, on Stephanie C. Bengford, attorney for Defendant USDA, and Jon E. Arneson, attorney for Plaintiff Argus Leader Media, on this 21st day of October, 2019.

/s/ R. Alan Peterson
R. Alan Peterson